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No. _____

In The

Supreme Court of the United States

JONATHAN M. TAMPICO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. THE "APPEARS TO BE" LANGUAGE IN 18 U.S.C. §2256(8) IS VAGUE AND OVERBROAD AND PROHIBITS SPEECH PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

2. WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE TO IMPOSE AN ENHANCED SENTENCE WITHOUT PRESENTING THE ALLEGATION OF A PRIOR CONVICTION TO A GRAND JURY, BY NOT INCLUDING SUCH AN ALLEGATION IN THE INDICTMENT, AND BY NOT INTRODUCING ANY EVIDENCE REGARDING A PRIOR CONVICTION TO THE TRIER OF FACT.

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PRAYER

The petitioner, Jonathan M. Tampico, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued July 6, 2001.

OPINIONS BELOW

On July 6, 2001, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. *United States v. Tampico*, (5th Cir. 2001). A copy of that opinion is attached as Appendix A.

JURISDICTION IN THE SUPREME COURT

On July 6, 2001, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States alleging violations of Sections 2252, 2252A, 2256, and 2253 of Title 18, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part as follows: Congress shall make no law . . . abridging the freedom of speech. . . .

2. The Sixth Amendment to the United States Constitution provides in pertinent part as follows: In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

3. 18 U.S.C. §2252 is set out in Appendix B.

4. 18 U.S.C. §2252A is set out in Appendix B.

5. 18 U.S.C. §2256 is set out in Appendix B.

STATEMENT OF THE CASE

Course of Proceedings

Pursuant to a four count indictment, the government instituted proceedings against the Appellant, Jonathan M. Tampico, in the United States District Court for the Southern District of Texas, Houston Division, for alleged

violations of child pornography laws. Count one charged Tampico with possession of child pornography involving the sexual exploitation of minors, in violation of 18 U.S.C. §2252(a)(4)(B). Count two charged Tampico with receipt of child pornography involving the sexual exploitation of minors, in violation of 18 U.S.C. §2252(a)(2). Count three charged Tampico with distribution of child pornography involving the sexual exploitation of minors, in violation of 18 U.S.C. §2252(a)(2). Count four charged Tampico with reproduction of child pornography involving the sexual exploitation of minors, in violation of 18 U.S.C. §2252A(a)(3). (Doc. 1). Count five dealt with forfeiture of Tampico's property.

A bench trial on stipulated facts was held on September 17, 1999. After this trial, Tampico was found guilty on Counts one, two and three. Tampico was found not guilty on Count four.

Prior to sentencing, a presentence report was prepared. Tampico filed objections to the report. No objections were filed by the government.

The district court sentenced Tampico to 60 months confinement on Count one. The Court upwardly departed on Counts two and three, sentencing Tampico to 360 months confinement. All three sentences are to run concurrently. Tampico was ordered to serve three years supervised release on Count one, and five years on Counts two and three, all to run concurrently. A $5000.00 fine was imposed and Tampico was ordered to pay a $300 special assessment. (Doc. 123). Tampico is currently serving his sentence.

On February 15, 2000, Tampico filed his written Notice of Appeal to the Fifth Circuit Court of Appeals in New Orleans. (Doc. 124). On July 6, 2001, the Fifth Circuit issued its opinion affirming Tampico's conviction and sentence on the three counts.

STATEMENT OF FACTS

In June 1998, Tampico was the subject of a report on America's Most Wanted. In July, 1998, Sergeant Chuck Fleeger of the College Station Police Department received a phone call from Officer Dave Goodness of the Fremont Police Department in California. Goodness indicated that Tampico had been arrested in College Station, Texas on July 4, 1997. Goodness also indicated that Tampico had been with some other people the night of his arrest.

The College Station police investigated and learned that Donald Sandburg and Jerome Ciolino were with Tampico the night he was arrested. Property records checks revealed that Ciolino owned rental properties in Bryan, Texas. Surveillance was conducted and search warrants were ultimately obtained for Ciolino's residence, as well as the residence of Donald Sandburg. Ciolino and Sandburg both told the police that Tampico lived in apartment #3D at 801 Yegua. Sandburg also told the police that he borrowed a child pornography video from Tampico. Sandburg said the video was in his residence along with a file of computer print outs from Tampico's residence containing child pornography. Sandburg also said that he had been in Tampico's residence

five to six times and observed child pornography on Tampico's computer and in his house.

On July 24, 1998, the police obtained a warrant for Tampico's residence and a storage shed behind the residence. Tampico was arrested and numerous items were seized. Many of the items were personal items, such as stereo equipment, cameras, computer equipment, and slide projectors. Computer disks, photographs, books, magazines, slides, and manuscripts were also seized.

The government submitted some of the photographs to Dr. Sheila Lahoti, who gave an opinion, based upon her experience, that the individuals in the submitted images "appeared to be" under the age of 18. This opinion was rendered using the Tanner analysis.

A bench trial was conducted to the district court on stipulated facts. Prior to the trial, Tampico presented a motion to dismiss the indictment in this case, arguing that the language of the statute, specifically 18 U.S.C. §2256(8) which defines child pornography as depictions that "appear to be" of minors, was unconstitutionally vague and overbroad, in violation of the First Amendment to the United States Constitution. (Doc. 41). This motion was denied by the district court. (Doc. 51).

During the sentencing proceeding, the district court departed upward from the 15 year maximum sentence for Counts two and three and sentenced Tampico to concurrent 30 year sentences. The district court justified the enhanced sentence on the ground that Tampico had previously been convicted of an offense involving a child. Tampico objected to the enhancement allegation, which first appeared in the presentence report. The government

had not alleged a prior conviction for enhancement purposes in the indictment, and no evidence of the prior conviction was presented to the district court during the bench trial.

REASONS FOR GRANTING THE WRIT AS TO ISSUE NUMBER ONE

This Court should grant certiorari to review the Court of Appeals' finding that the "appears to be" language in 18 U.S.C. §2256(8) is not vague and not overbroad and that it does not prohibit speech protected by the First Amendment to the United States Constitution. Currently, a conflict exists among the Circuit Courts of Appeals as to the constitutionality of this particular definition of the Child Pornography Prevention Act.

This case raises an important issue regarding the constitutionality of the Child Pornography Prevention Act. The First Amendment to the United States Constitution provides that Congress shall make no law abridging the freedom of speech. As interpreted by the Courts, the First Amendment broadly protects sexually explicit expression which is not obscene. In fact, the First Amendment has even been held to protect the possession of obscene materials in the privacy of one's home, as long as the material does not depict an actual minor. Currently, a conflict exists in the Circuit Courts of Appeals as to the constitutionality under the First Amendment of the "appears to be" language in the Child Pornography Prevention Act.. *See U.S. v. Hilton*, 167 F.3d 61 (1st Cir. 1999), the Eleventh Circuit's opinion in *U.S. v. Acheson*, 195 F.3d

645 (11th Cir. 1999), and the Fifth Circuit's opinion in the instant case and *U.S. v. Fox*, 248 F.3d 394 (5th Cir. 2001), which uphold the constitutionality of the language. In *Free Speech v. Reno*, 198 F.3d 1083 (9th Cir. 1999), the Ninth Circuit struck down this language. This Court has granted certiorari in *Free Speech v. Reno*.

In Tampico's case, the government presented an indictment which consisted of four separate counts: Count one charged Tampico with possession of child pornography involving the sexual exploitation of minors, in violation of 18 U.S.C. §2252(a)(4)(B). Count two charged Tampico with receipt of child pornography involving the sexual exploitation of minors, in violation of 18 U.S.C. §2252(a)(2). Count three charged Tampico with distribution of child pornography involving the sexual exploitation of minors, in violation of 18 U.S.C. §2252(a)(2). Count four charged Tampico with reproduction of child pornography involving the sexual exploitation of minors, in violation of 18 U.S.C. §2252A(a)(3). All of these statutory provisions fall under Chapter 110, entitled "SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN". Section 2256 provides the definitions for this chapter. Section 2256(8) defines "child pornography" as follows:

> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where –

> (A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;
>
> (B) *such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;*
>
> (C) such visual depiction has been created, adapted, or modified *to appear* that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner *that conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. (emphasis added).

These definitions apply to every alleged violation of the Child Pornography Prevention Act. Therefore, when the government charged Tampico with the various offenses involving child pornography, the government was only required to prove for each violation that the visual depictions involved persons *who appeared to be minors.* In fact during the trial in this case, under the stipulated facts, the government's expert stated, via her report, that after her evaluation and based upon her experience, the individuals depicted in the images submitted for her exam " . . . appear to be, in her expert opinion . . . " under the age of 18. (Doc. 91, pg. 8).

The U.S. Supreme Court in *New York v. Ferber* held that a ban on child pornography could be justified by the compelling state interest in preventing the sexual exploitation of actual minors in the production of child pornography. *New York v. Ferber,* 458 U.S. 747 (1982). The Court

in *Ferber* focused on the instant and future harm to the actual minors who participate in the production of the images. In *Osborne v. Ohio*, 495 U.S. 103 (1990), the Court reasoned that even private possession fueled the market for the images and thus could be banned in order to stifle demand for the production of the images. In each instance, the Court justified the prohibition as a means of preventing the harms caused by the production of the material. The *Ferber* Court stated that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproductions of live performances, retains First Amendment protection." *Ferber*, 458 U.S. at 764-65. Furthermore, the Court went on to note that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.* at 763 (citations omitted). For emphasis, the *Ferber* court referred to a list of examples of simulation provided by the petitioner and said that simulation "is not merely a hypothetical possibility." *Id.* at 763 n. 16. Thus, the statute in this case unconstitutionally prohibits wholly computer generated images and other simulated expression, which was protected by *Ferber*.

The government's compelling interest in preventing the use of minors in the production of sexually explicit material is not implicated where the conduct is simulated or an actual minor is not depicted in the images, i.e., where the image merely "appears to be," but is not actually of a minor engaged in sexually explicit conduct. The First Amendment broadly protects sexually explicit

expression which is not obscene. In fact, the First Amendment even protects the possession of obscene materials in the privacy of one's home, as long as the material does not depict an actual minor. *Osborne v. Ohio*, 495 U.S. 103 (1990); *Stanley v. Georgia*, 394 U.S. 557 (1969).

In this case, the government relied on the "appears to be" language in making its case. No evidence was presented as to the actual ages of any of the individuals depicted in the photographs, other than the testimony of the government's expert who relied upon the "appears to be" language in making her conclusion using the Tanner scale. It is this method of allowing the government to prosecute individuals using the "appears to be" language that makes it vague and overbroad.

The courts have held, however, that any restriction on expression must not be overbroad or vague. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976). Even if the First Amendment allowed the government to ban sexually explicit images which merely *appear* to depict minors engaged in sexually explicit activity, the definition of child pornography supplied by 18 U.S.C. §2256(8) executes the ban in a manner which is unconstitutionally vague and overbroad on its face. The First Amendment protections are so critical to our society that standing is granted to a defendant who wishes to challenge the facial constitutionality of a prohibition on speech, even though the prohibition as applied to that defendant might be constitutional. *Ferber*, 458 U.S. at 768-769. In this case, Tampico submits that the use of the term "appears to be" renders 18 U.S.C. §2256(8) facially unconstitutional due to overbreadth and vagueness.

Overbreadth occurs when a statute prohibits unprotected expression in a manner which also chills protected expression. *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). A statute is overbroad under the First Amendment when in addition to proscribing activities which may properly be forbidden, it also sweeps within its coverage activity protected by the guarantee of free speech. *See Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). The overbreadth doctrine is powerful in free expression cases, as the movant need not demonstrate that his conduct was protected, as long as the Court is persuaded that the statute infringes upon an unacceptable level of activity privileged under the First Amendment. *See Kunz v. New York*, 340 U.S. 290 (1951).

Vagueness occurs when people of normal intelligence would not be able to identify sufficiently the prohibited behavior and must therefore guess at its meaning and differ as to its application. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979). Vague laws share common problems. First, they grant unfettered discretion to police officers in applying them which leads to selective enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Second, uncertainty as to just what is prohibited chills the speech rights of the citizens. *See Arnett v. Kennedy*, 416 U.S. 134, 234 (1973) (Marshall, J., dissenting).

The standards for evaluating vagueness were set out in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (footnotes omitted):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we

> insist that laws give the person of ordinary intelligence *a reasonable opportunity to know what is prohibited*, so that he may act accordingly. Vague laws trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. (emphasis added)

The statute in this case is vague because there is no sufficiently narrow way to define, if at all, the term "appears to be" as used in 18 U.S.C. §2256(8). This definition is subjective and will vary from individual to individual. It is not possible to know all of the ways that an image may "appear to be" of a minor engaging in sexually explicit conduct. Such a determination may depend, without limitation, upon the appearance of the individual, the background in the image, the items in the background, the packaging of the image, the tone and content of any words spoken, the type of activity depicted, the clothing worn, or the facial and other physical expressions. Further complicating the definition of what might "appear to be" of minors engaged in sexually explicit conduct is the fact that individuals of different ages or socio-economic backgrounds have different perspectives. One person may think certain images "appear to be" of minors engaging in sexually explicit conduct, while another person may adamantly disagree. This uncertainty – as to what type of expression is or is not prohibited – makes the statute unconstitutional.

For example, in *U.S. v. Katz*, 178 F.3d 368 (5th Cir. 1999), the district court conducted a *Daubert* hearing on the admissibility of government photos and expert testimony interpreting those photos. As to some of the photos, the district court noted that the amount of pubic hair appeared quite different depending on whether the court viewed the black and white versus the color photos, and concluded that this discrepancy illustrated the lack of reliability of the images in depicting the actual appearance of the person shown. The district court concluded that the problems with visibility attributed to the angles of the photos and the quality of the prints precluded the utilization of the Tanner Scale and thereby greatly reduced the probity of the exhibits. Probity and reliability became inextricably linked which, when balanced against prejudice, tilted the scale toward excluding not only Dr. Woodling's opinion testimony relating to the GIFs but the exhibits themselves. The district court further heard testimony indicating that the scientific methodology of the Tanner Scale was not sufficiently verified on non-Caucasians. This is because the Tanner stage 5 breast development band encompasses ages 5 through 19.

In *U.S. v. Long*, 108 F.3d 1377 (6th Cir. 1997), the U.S. Customs Service sought the opinion of a Dr. Robert Shapiro, a Cincinnati pediatrician who was familiar with the use of the Tanner Scale methodology used to help doctors measure the stages of puberty in a child. After his review of the government's evidence, Dr. Shapiro wrote a letter stating that he could not determine that any of the individuals shown were under the age of 18. Not satisfied with that, the Customs Service contacted another doctor,

Dr. Granacher, who reviewed the same photos and utilizing the Tanner Scale, found several individuals to be under the age of 18.

In *U.S. v. Chapman*, 60 F.3d 894 (1st Cir. 1995), the defendant was alleged to have boasted that he was going to scan and send a photograph of himself having sex with a 12 year old girl. An FBI nurse later stated that the girl "appeared to be" under 18 years old. *Id.* at 895. The district court, however, reviewed this photo and determined that the girl was not even a minor. *Id.* at 900.

The "appears to be" language would undoubtedly cause constitutional problems if the phrase was used, for example, in statutes relating to the right to vote or the requirement to register for the selective service. The statute could not be worded to allow voting or require registration with the draft authority by anyone who "appears to be" eighteen or older. Similarly, a myriad of problems would be caused by any driver's license law, or any other licensing statute, that used the phrase "appears to be" with regard to an applicant's required age. The constitution would prohibit enforcement of a law mandating the retirement of any individual who "appears to be" 65 or more years old. An individual does not, of course, "appear" any different in the moments just before and just after he or she turns 18 years old. The language of the statute at issue impermissibly allows for enforcement based simply upon individual perceptions of when the changes in appearance do occur.

The overbreadth of the prohibition in this statute flows from the substantial amount of protected expression involving young looking adults that may be chilled

because of a fear that the expression may be deemed to "appear to be" child pornography. All non-obscene images of any adult, no matter how young they appear, are protected by the First Amendment. *Ferber*, 458 U.S. at 764-765. The chilling effect of this statute on images of young adults is constitutionally unacceptable.

The difficulty in distinguishing between minors and young adults is illustrated by the findings of the Food and Drug Administration that identification and verification of any person under the age of 27 is required in order to prevent the sale of tobacco products to minors. 21 C.F.R. §897.14(b)(2) (1997). The government has thus recognized that it is sufficiently difficult to distinguish between a minor and a 26 year old to justify such a requirement. Likewise, in the case of child pornography, the difficulty of distinguishing between minors and young adults prohibits the use of an overbroad definition such as the one found in 18 U.S.C. §2256(8).

Moreover, Congress has further acknowledged the difficulty of identifying the age of any particular individual by enacting 18 U.S.C. §2257(b) and (e). Section (b) requires the producer of any sexually explicit material to "ascertain, by examination of an identification document containing such information, the performer's name and date of birth . . . " Section (e) requires a producer to affix to the produced material the location of where the performer's identifying records are located. The government wants to be able to determine if a proper investigation into the performer's age has been conducted by the producer. This indicates the government investigators will be

unable to determine the performer's age simply by viewing the material. Yet the vague and overly broad language of 18 U.S.C. §2256(8) places this same impossible burden on all other citizens.

The Supreme Court has held that the First Amendment mandates that there be a requirement of knowledge that the performer was actually a minor and that the materials are sexually explicit. *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). The knowledge requirement is designed to prevent the chilling effect on protected speech that would result from strict liability for possession. The Defendant submits that the knowledge requirement also prohibits statutes which contain inherently subjective definitions. The phrase "appears to be" defies a finding of knowledge because it refers to how something seems to be, not necessarily how it actually is. The Defendant submits that an individual cannot possibly be deemed to have knowledge of how any other individual will view an image.

A District Court in Maine found the "appears to be" language of 18 U.S.C. §2256(8) unconstitutionally vague. *U.S. v. Hilton*, 999 F.Supp. 131 (D. Maine 1998). The First Circuit Court of Appeals reversed this ruling, however, stating in part that it was the intended effect upon the viewer which was one of the motivating concerns of Congress when enacting the CPPA. That is, whether the image is real, wholly computer generated, or part real, part computer altered, it was the effect upon the viewer which prompted Congress to pass 18 U.S.C. §2252A. *U.S. v. Hilton*, 167 F.3d 61 (1st Cir. 1999).

Yet, in *U.S. v. Amirault*, 173 F.3d 28 (1st Cir. 1999), the same court of appeals stated that it was a mistake to look at the actual effect of the photograph upon the viewer. "We have serious doubts that focusing upon the intent of the deviant photographer is any more objective than focusing upon a pedophile-viewer's reaction; in either case, a deviant's subjective response could turn innocuous images into pornography. Moreover, a focus on the photograph's use seems inconsistent with the statute's purpose of protecting the child." *Id.* at 34.

Recently, the Ninth Circuit Court of Appeals declared the "appears to be" language unconstitutionally vague and overbroad. In *Free Speech v. Reno*, 198 F.3d 1083 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 876, the court of appeals stated as follows: "We find that the phrases 'appears to be' a minor and 'convey[s] the impression' that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirement of the First Amendment. Consequently we hold that while these two provisions of the Act do not pass constitutional muster, the balance of the Child Pornography Prevention Act is constitutional when the two phrases are stricken." The court in *Free Speech v. Reno* acknowledged the First Circuit's opinion in *U.S. v. Hilton*, and even agreed with the First Circuit's conclusion that the child pornography act was content-based because it expressly aims to curb a particular category of expression, child pornography, by singling out the type of expression based on its content and then banning it. The Ninth Circuit disagreed with the First Circuit's conclusion that the statute including the "appears to be" language was constitutional, however. In doing so, the Ninth Circuit stated the following:

> The two phrases in question are highly subjective. There is no explicit standard as to what the phrases mean. The phrases provide no measure to guide an ordinary intelligent person about prohibited conduct and any such person could not reasonably be certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to a criminal prosecution.
>
> In the same light, the absence of definitions for these key phrases in the CPPA allows law enforcement officials to exercise their discretion, subjectively, about what "appears to be" or what "conveys the impression" of prohibited material. Thus, the vagueness of the statute's key phrases regarding computer images permits enforcement in an arbitrary and discriminatory fashion.

Free Speech v. Reno, 198 F.3d at 1095.

Conclusion

Based on the foregoing, Tampico contends that the Court should hold the language contained in 18 U.S.C. §2256(8) unconstitutional. Since this was the language relied upon by the government in obtaining the convictions against Tampico, his convictions should be reversed and remanded to the district court with instructions to dismiss the indictment. For these reasons, Tampico respectfully prays that his application for Writ of Certiorari be granted by this Court.

REASONS FOR GRANTING THE WRIT AS TO ISSUE NUMBER TWO

This Court should grant certiorari to address the issue as to whether a sentence above the statutory maximum is permissible, even though the Government failed to allege in the indictment, or present to the grand jury, the allegation that a prior conviction would be used to increase a statutory maximum.

The range of punishment for a violation of the offense with which Tampico was charged, 18 U.S.C. §2252(a)(2), is not more than 15 years and a fine. If a defendant has a prior conviction for certain qualifying offenses, the statute provides that the range shall be 5 to 30 years and a fine. In this case, Tampico was convicted in Counts two and three of violating §2252(a)(2).[1] The indictment, however, contained no allegation that Tampico had previously been convicted of a felony that would qualify as an aggravating fact such as would provide for an increased statutory range of punishment, nor was Tampico ever provided formal notice prior to trial that the government intended to seek the enhanced statutory sentence for any of the violations. No evidence was provided by the government to the district court regarding a prior conviction. Thus, the PSR was the first time

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[1] Tampico was charged in count one with a violation of 18 U.S.C. §2252(a)(4)(B), which provided for a maximum sentence of five years, but if a prior conviction existed, the range was 2 to 10 years. Tampico was sentenced to 5 years on count one. Therefore, the arguments made in this issue do not apply to the sentence on count one.

that Tampico received any written notice of the possibility of the enhanced sentences. Tampico objected in his objections to the PSR. This objection was overruled.

During the sentencing, the district court departed upwards from the applicable sentencing guidelines on Counts two and three, sentencing Tampico to 30 years. These two counts, however, provided for a statutory maximum of 15 years without notice of a prior conviction.

An indictment must contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend. *Hamling v. United States*, 418 U.S. 87, 117 (1974). Rule 7 of the Federal Rules of Criminal Procedure echoes this condition in its requirement that the indictment be a "plain, concise and definite written statement with the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). The Supreme Court has recognized the indictment's role in warning a defendant of facts that may enhance his punishment upon conviction. *See, e.g., Jones v. United States*, 526 U.S. 227 (1999).

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Supreme Court held, in a five-to-four decision, that an indictment in an illegal reentry case need not allege a defendant's prior "aggravated felony" conviction in order for a district court to sentence the defendant to an "enhanced" sentence under 8 U.S.C. §1326(b)(2) based on the defendant's prior conviction. *Almendarez-Torres*, 523 U.S. at 247. The majority held that §1326(b)(2) merely created a "sentencing factor" that need not be pleaded in the indictment in order to result in an enhanced sentence

based on a defendant's prior "aggravated felony" conviction. *Id.* at 243.

Justice Scalia, joined by Justices Stevens, Souter and Ginsburg, dissented from the Court's holding in *Almendarez-Torres*. *Id.* at 248. The dissenters contended that §1326(b)(2) was not merely a "sentencing factor" but, instead, was a separate offense. *Id.* at 270-71. As a result, the dissenters contended, the fact of a defendant's prior conviction had to be pleaded in the indictment in order for a district court to impose an "enhanced" sentence above the two-year maximum sentence provided for by 8 U.S.C. §1326(a). *Id.*

On June 26, 2000, the Supreme Court issued its decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, (2000) , which addressed the constitutionality of an enhanced prison sentence under New Jersey's "hate crime" sentencing enhancement statute when a jury had not found the operative "sentencing fact" beyond a reasonable doubt and instead, the trial court simply found the operative fact by a preponderance of the evidence at the sentencing hearing. The Supreme Court held that Apprendi's enhanced sentence was unconstitutional. *Id.*

In the course of the Court's reasoning in *Apprendi*, the majority of the Court stated that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested. . . . " *Apprendi*, 120 S.Ct. at 2362. Footnote 15 of the Court's decision then noted that "[i]n addition to the reasons set forth in Justice Scalia's dissent [in *Almendarez-Torres*], 523 U.S. at 248-60, it is noteworthy that the Court's extensive discussion of

the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue." *Apprendi*, 120 S.Ct. at 2362, FN 15 (*citing U.S. v. Reese*, 92 U.S. 214, 232-33 (1876)).

Justice Thomas, who was in the five-Justice majority in *Almendarez-Torres*, wrote in his concurring opinion in *Apprendi* that he had erred in joining the majority opinion in *Almendarez-Torres*. *Apprendi*, 120 S.Ct. at 2368. (Thomas, J., concurring). He stated as follows:

> . . . a 'crime' includes every fact that is by law a basis for imposing or increasing punishment. . . . Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime. . . . The aggravating fact is an element of the aggravated crime."

This statement by Justice Thomas mirrors the majority's quotation of *U.S. v. Reese*, 92 U.S. 214, 232-233 (1875), which stated: "[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." *Apprendi*, 120 S.Ct. at 2362, FN 15. Justice Thomas went on further to cite numerous other cases, both state and federal, as well as treatises wherein it was stated that a prior conviction was an element of an aggravated offense and must be pleaded and proven. In light of the majority opinion and Justice Thomas's concurring opinion in *Apprendi*, the Supreme Court should

overrule *Almendarez-Torres*.[2] If the Court were to do so, it would require Tampico's sentences to be vacated and his case remanded for resentencing under 18 U.S.C. §2252(a)(2), which provided for a fifteen year statutory maximum sentence. As discussed above, the indictment in his case did not allege the fact of his prior felony conviction. Thus, the district court's sentences of 360 months on Counts two and three – which were well above the 15 year maximum sentence provided for in 18 U.S.C. §2252(a)(2) – were illegal in light of the dissenting opinion in *Almendarez-Torres* and the majority and Justice Thomas's concurring opinion in *Apprendi*.

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[2] *Stare decisis* should be not a bar to the Supreme Court's decision to overrule *Almendarez-Torres*. That prudential doctrine "is not an inexorable command," particularly when a prior decision of the Supreme Court was "badly reasoned." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). As discussed by both the majority opinion and Justice Thomas's concurring opinion in *Apprendi*, *Almendarez-Torres* was badly reasoned and incorrectly decided.

CONCLUSION

Tampico respectfully requests that certiorari be granted in this case to resolve the issue as to whether the fact of a prior conviction, if it is to be used to enhance one's punishment, must be pled by the government in the indictment and presented to the trier of fact to be determined beyond a reasonable doubt.

Date: October 2, 2001

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20178

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JONATHAN M. TAMPICO

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:98-CR-485-1

(Filed Jul. 06, 2001)

Before HILL,* JOLLY, and BENAVIDES, Circuit Judges.

PER CURIAM:**

Jonathan Tampico appeals his conviction and sentence for the possession, receipt and distribution of child

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* Circuit Judge of the Eleventh Circuit, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

pornography, in violation of 18 U.S.C. § 2252-2252A. Because the statute under which Tampico was convicted was constitutional, there was sufficient evidence to convict him, and there was no error in the sentence, we AFFIRM Tampico's conviction and sentence.

I

In 1989, approximately ten years before the conviction at issue here, Jonathan M. Tampico was convicted of sexually molesting a boy under the age of 14 years, and was sentenced to six years in prison in California. He was released in October 1992 on the condition that he not possess child pornography. Tampico's parole was revoked on September 12, 1995, after police discovered a large volume of child pornography at his residence. He was released again on February 23, 1996, when California authorities discovered he had discharged his parole. Although the California district attorney's office intended to file state charges for the possession of child pornography, Tampico left California and moved to Texas, without informing either the California or Texas authorities of his new address. A television broadcast of "America's Most Wanted" on July 11, 1998, led to his arrest in Texas.

After Tampico's arrest, authorities seized a large volume of child pornography from Tampico's residence and storage shed, much of which Tampico had brought from California by U-Haul. Both the individual with whom Tampico was living, Jerome Ciolio [sic], and another individual who had obtained child pornography from Tampico, Donald Sandberg, gave statements implicating Tampico in offenses relating to child pornography.

On December 9, 1998, Tampico was indicted for violations of the federal statute prohibiting child pornography and the sexual exploitation of children. 18 U.S.C. § 2252-2252A. Specifically, Counts One through Four of the indictment charged Tampico with, respectively, possession, receipt, distribution, and reproduction of child pornography involving the sexual exploitation of minors. Count Five dealt with the forfeiture of Tampico's property.

A bench trial on stipulated facts was conducted on September 17, 1999. Tampico admitted to possession of the evidence seized by the government, stated that Sandberg had obtained certain photographs from Tampico's computer, and stipulated that the videos and photographs had been transported in interstate commerce. The government also submitted evidence, through the testimony of an FBI agent, that Sandberg and Ciolino had told the FBI that Tampico had transported a great deal of the same child pornography from California. Sandberg told the FBI that he was computer illiterate and that Tampico had printed the computer images off his computer for Sandberg. After examining the photographs, a government expert, Dr. Sheila Lahoti, determined, through Tanner analysis, that the children appeared to be between the ages of nine and eighteen years. The district court found Tampico guilty of Counts One, Two, and Three, that is, possessing, receiving, and distributing child pornography. It found him not guilty of Count Four, reproducing child pornography.

Tampico submitted over sixty objections to the Presentence Investigation Report ("PSR"). The district court addressed each of these objections, some of which the

court sustained, during the sentencing hearing on February 14, 2000. The district court then sentenced Tampico to 60 months on Count One, and 360 months each for Counts Two and Three, to run concurrently. The 360-month sentence represented an upward departure, based on the general policy statement of U.S. Sentencing Guideline § 5K2.0, from the Sentencing Guideline range of 210 to 262 months of confinement. The district court gave a number of reasons for granting the upward departure, including: Tampico's departure from California without notifying the authorities within days of his release from prison for sexually assaulting a minor; the sheer volume of images involved; Tampico's continued exploitation of certain victims, even after incarceration; his involvement in the North American Man Boy Love Association ("NAMBLA"); and his extensive history of exploiting children.

II

Tampico now appeals both his conviction and his sentence. He challenges the constitutionality of 18 U.S.C. § 2256(8), the sufficiency of the evidence for his conviction on the distribution count, the district court's upward departure on his sentence, and the district court's admission of the Presentence Investigation Report ("PSR") as evidence during the sentencing hearing.[1]

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[1] For the purpose of Supreme Court review, Tampico also contends that the district court erred in enhancing his sentence under 18 U.S.C. § 2252A(b)(1) for a prior conviction relating to sexual abuse, because the prior conviction was not alleged in the indictment. Tampico claims that this is unconstitutional

A

Tampico first contends that the definition of child pornography under the Child Pornography Prevention Act, 18 U.S.C. § 2252A, is vague and overbroad, and prohibits protected speech in contravention of the First Amendment. Section 2256(8), which provides the definition of child pornography for all of the counts against Tampico, defines child pornography as:

> any visual depiction, including any photograph, film, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where –
>
> (A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;
>
> (B) *such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;*
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a

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after the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which found that sentencing factors must be proved beyond a reasonable doubt. Tampico recognizes, however, that this issue is foreclosed by the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

> manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

19 U.S.C. § 2256(8) (emphasis added). Tampico's challenge focuses on the "appears to be" language in the statute. He contends that non-obscene, sexually explicit images that merely *appear to* depict minors are protected speech under the First Amendment.

Tampico's First Amendment challenge to § 2252A is foreclosed by our recent decision in *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001), which upheld the constitutionality of the "appears to be" language. In *Fox*, we found that § 2252A survived strict scrutiny because of the government's compelling interest in "shielding all children from sexual exploitation resulting from child pornography." *Id.* at 402 (quoting *United States v. Mento*, 231 F.3d 912, 920 (4th Cir. 2000)). We also found that the statute was neither overbroad nor void for vagueness. *Fox*, 248 F.3d at 404-07. Thus, we reject Tampico's constitutional challenge to the statute.

B

Tampico next claims that the evidence was insufficient to prove him guilty of Count Three, the distribution of child pornography under 18 U.S.C. § 2252(a)(2). In reviewing challenges to the sufficiency of the evidence, we generally hold the evidence sufficient if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Resio-Trejo*, 45 F.3d 907, 910-11 (5th Cir. 1995). Because

Tampico failed to make and renew a motion for a judgment of acquittal, however, our review is limited to plain error review. *United States v. Willis*, 38 F.3d 170, 178 (5th Cir. 1994). Under this standard, the conviction can be reversed only if there was a "manifest miscarriage of justice," such as a complete lack of evidence to support the verdict, or such tenuous evidence that the conviction itself was shocking. *United States v. Villasenor*, 236 F.3d 220, 222 (5th Cir. 2001) (citations omitted).

Tampico contends that the evidence was insufficient to convict him of distribution of child pornography because the court acquitted him of reproduction of child pornography. He argues that the government only offered evidence that Tampico distributed child pornography to Sandberg, by printing pictures off the computer. Tampico claims that a verdict that he did not reproduce the photographs is therefore inconsistent with a verdict that he distributed these photographs to Sandberg, because the reproduction of the photographs off the computer was necessary for their distribution. He also claims that while a jury may render inconsistent verdicts, a court in a bench trial may not.

The claim on which Tampico was acquitted, however, was for "knowingly reproduc[ing] any child pornography for distribution through the mails, and in interstate and foreign commerce by any means, including by computer." 18 U.S.C. § 2252(a)(3*j*. Because the reproduction claim required the government to show that Tampico reproduced child pornography for "distribution through the mails, or in interstate and foreign commerce by any

means, including by computer," an acquittal on the reproduction claim does not mandate the inference that Tampico did not reproduce child pornography. Tampico's conviction on the distribution charge under § 2252A(a)(2), on the other hand, did not require proof of an intent to distribute through the mails or in interstate commerce; it required proof that Tampico distributed materials containing child pornography that had "been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer." 18 U.S.C. § 2252A(a)(2)(a), (b). Thus, Tampico's acquittal on the charge of reproducing child pornography did not automatically require acquittal on the charge of distributing child pornography. The court reasonably could have found that Tampico reproduced child pornography to distribute, not in interstate commerce, but to Sandberg, who lived next door. The act of distributing the child pornography (which had been in interstate commerce) to Sandberg could then form the basis for the distribution charge.

Because there is evidence that Tampico knowingly distributed child pornography to Sandberg, and there was evidence that the child pornography had been in interstate commerce, Tampico's conviction is not a manifest miscarriage of justice. The evidence is sufficient to support the district court's verdict on Count Three.

C

Tampico next contends that the district court abused its discretion by departing upward on Tampico's sentence

for Counts Two and Three to 360 months from the sentence guideline of 210 to 262 months. Tampico contends that the district erred by considering (1) evidence on the quantity of pornographic materials when the exact quantity was unclear, (2) factors that had already been taken into account under the guidelines, and (3) Tampico's membership in NAMBLA. He also argues that the district court failed to give him notice that it was planning to consider certain facts as grounds for upward departure.

We review the district court's upward departure from the sentencing guidelines for abuse of discretion. *United States v. Route*, 104 F.3d 59, 64 (5th Cir. 1997). "[W]e will affirm an upward departure if (1) the court gives acceptable reasons for departing, and (2) the extent of the departure is reasonable." *Id.* Upward departure is justified when the case is atypical, and does not fall into the "heartland" of cases embodied by the sentencing guidelines. *United States v. Winters*, 174 F.3d 478, 482 (5th Cir. 1999). More specifically, the sentencing court may depart from the guidelines if it finds an aggravating circumstance not adequately taken into account by the guidelines, or if unusual circumstances render the guideline level insufficient. *Id.* The district court's determination is entitled to substantial deference because of the district court's particular competence to determine whether a case is ordinary or unusual compared to the vast majority of cases. *Id.*

If the district court departs from the Sentencing Guidelines for reasons not included in the PSR or other presentencing submissions, it must give the parties notice and specifically identify the grounds for an upward departure. *United States v. Nevels*, 160 F.3d 226, 231 (5th

Cir. 1998). Because Tampico did not object to the lack of notice in the district court, his allegations of lack of notice are reviewed for plain error. *See* Fed. R. Crim. P. 52(b); *Nevels*, 160 F.3d at 231. Even assuming plain error, the sentence merits reversal only if the error affects the substantial right of the defendant or seriously affects the fairness of the proceeding. *United States v. McDowell*, 109 F.3d 214, 216 (5th Cir. 1997). The defendant has the burden of proving that the error was prejudicial. *Nevels*, 160 F.3d at 231.

In justifying its upward departure, the district court noted: first, that the sentencing guidelines did not adequately take into account the volume of pornographic images; second, that the defendant had sexually molested children other than the victim that led to Tampico's first conviction; third, that Tampico had used the Big Brothers program to target children for sexual exploitation, and had therefore smudged the reputation of the Big Brothers program; fourth, that Tampico associated with NAMBLA, a group known to promote adult/child sexual relations, including the support of a foster home in Thailand for the sexual exploitation of children; and fifth, that the defendant's criminal history category was underrepresentative of the seriousness of his conduct and the likelihood of recidivism, as he failed to notify officials of his change of address when he moved to Texas.

1

Tampico first argues that the volume of pornographic material is not an appropriate ground for departure, because the district court did not actually know what

volume of child pornography Tampico had in his possession. Tampico points to the fact that the district court sustained an objection to information in the PSR that deemed all of the visual depictions as child pornography, but overruled Tampico's objection to a paragraph in the PSR which described the amount of child pornography seized in California, even though that amount included as child pornography images that the other ruling suggested were not pornographic. Even if the district court could not determine the exact volume of child pornography, however, Tampico was clearly in possession of significant amounts of child pornography. The government's exhibit list contained over 300 pages of details concerning material's recovered from Tampico. Tampico rented a U-Haul to move the materials from California to Texas. Because there was significant evidence for the district court to rely on in considering the volume of pornographic materials, the court did not abuse its discretion in considering the volume of materials in granting the upward departure.

2

Tampico next contends that the district court should not have considered the sexual abuse of other children because a five level increase had already been imposed under U.S. Sentencing Guideline § 2G2.2(b)(4) for a pattern of activity involving the sexual abuse or exploitation of a minor. Tampico refers to the commentary definition of pattern of activity to show that multiple minors and instances may be included in an increase under the

Guideline.[2] U.S.S.G.§ 2G2.2, cmt. n.1. The commentary to the guidelines, however, also notes that "an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved." U.S.S.G. § 2G2.2, cmt. n.2. Tampico was convicted in California for sexual abuse of a minor. The individual that Tampico had been living with, Jerome Ciolino, told the authorities that he had been abused by Tampico as a minor. In addition, the PSR contained a report by the authorities that one of Tampico's victims alleged that Tampico had sexually assaulted children who were part of the Big Brothers program. Furthermore, the PSR included information on the California case, which had initially involved six boys. The additional charges were dropped when Tampico agreed to plead guilty. The evidence also included pictures of Thai boys sitting on Tampico's lap, and information that members of NAMBLA were arrested in Thailand for sexual abuse related to a foster home for boys developed for sexual exploitation. Given this evidence of numerous instances of sexual abuse, it was not an abuse of discretion for the district court to consider the sexual

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[2] Pattern of activity involving the sexual abuse or exploitation of a minor is defined as

> any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

U.S.S.G. § 2G2.2, cmt. n.1.

abuse of other children in granting the upward departure.

3

Tampico also contends that the district court should not have considered his membership in NAMBLA during sentencing. Tampico claims that using membership in NAMBLA as a reason for upward departure violated Tampico's rights to free speech and association. He also argues that the PSR indicated that NAMBLA's purpose is to advocate abolition of the age of consent laws, not to promote adult/child sexual relations.

Although "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment," such evidence should not be admitted indiscriminately. *Dawson v. Delaware*, 503 U.S. 159, 164 (1992). To be admissible at sentencing, evidence concerning associations must be sufficiently related to the issues involved. *Boyle v. Johnson*, 93 F.3d 180, 183-84 (5th Cir. 1996). For instance, in *Dawson*, the Supreme Court remarked that evidence of membership in a racist group would be relevant if elements of racial hatred were involved in the murder. *Dawson*, 503 U.S. at 166. *See also Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir. 1997); *Boyle*, 93 F.3d at 183-85.

By arguing that NAMBLA's purpose is only to advocate the abolition of age of consent laws, Tampico is essentially claiming that his membership in NAMBLA is not related to his possession and distribution of child

pornography or to his history of sexual exploitation of children. Some of the NAMBLA literature in Tampico's possession, however, specifically advocated Man/Boy sexual relationships. Even the name NAMBLA, that is, the North American Man Boy Love Association, suggests relationships between adults and children. Because Tampico's membership in NAMBLA may indicate the increased likelihood of recidivism or a lack of recognition of the gravity of the wrong, Tampico's association with NAMBLA is relevant to his intentions and his conduct. The fact that Tampico is within his First Amendment rights in belonging to NAMBLA does not bar consideration of this evidence during sentencing.

Lastly, Tampico contends that he had no notice of the district court's intent to depart upward based on his sexual abuse of other children or his involvement in the Big Brothers program, and that departing California without informing local authorities was not a ground for departure included in the PSR. As noted earlier, Tampico did not object to the lack of notice in the district court, and we therefore review his contentions for plain error. Tampico's sentence merits remand only if Tampico demonstrates that a clear error affected his substantial rights or seriously affected the fairness of the proceeding.

Although neither his sexual exploitation of other children nor his involvement in the Big Brothers program were given as potential grounds for upward departure in the PSR, Tampico does not describe how notice would have affected the sentencing proceedings. Tampico claims he had no opportunity to respond to the allegation that he sullied the reputation of the Big Brothers program, but he does not explain how he would have responded. He

challenges the court's finding that he "molested numerous children" by noting that "based on the information presented to the district court, two or possibly three children were involved." The information in the record described above (the pictures of Thai boys sitting on Tampico's lap, the dropped charges of sexual abuse against six other boys, the testimony of one of Tampico's victims that Tampico had abused boys in the Big Brother program), clearly indicate that the district court would have departed upward even if Tampico had been given notice that these facts were going to be considered in an upward departure. Because Tampico has not carried his burden of showing that the lack of notice prejudiced him, we cannot find that the district court abused its discretion in considering these factors in its decision to depart upward.

Tampico also contends that the fact that he failed to notify officials of his change of address was not a ground suggested in the PSR for an upward departure, and thus should not have been considered in departing upward. The PSR recommended that Tampico's deliberate attempts to avoid arrest[3] be used as a ground for upward departure. The district court found that "the defendant's criminal history category is underrepresentative of the seriousness of his conduct and the likelihood that he would commit future crimes as he failed to notify officials of his change of residence which was required based on his conviction as a sex offender." Tampico does not seem

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[3] These attempts including "changing his appearance, living in a residence obtained in another person's name, and renting a storage shed using a false name."

to have broken the law by failing to notify officials of his change of residence. Given the evidence supporting the court's determination that the criminal history category was underrepresentative, however, we cannot find the district court's consideration of this factor prejudicial.

In sum, considering all of these facts together, the district court did not abuse its discretion in granting an upward departure of approximately three offense levels. The volume of pornographic images, the sexual molestation of numerous children, Tampico's membership in NAMBLA, and his smudging the reputation of the Big Brothers program take this case outside the heartland of ordinary cases. Viewing the record as a whole, we cannot say that the district court's departure was unreasonable. Thus, we find no reversible error in the district court's upward departure from the sentencing guidelines.

D

Finally, Tampico claims the district court erred by accepting as evidence the portions of the PSR to which Tampico objected. He contends that, for the portions of the PSR to which he objected, the government should either have been required to introduce evidence to support those facts, or the court should not have considered those facts in enhancing Tampico's sentence.

Generally, "a PSR bears sufficient indicia of reliability, such that a sentencing judge may consider it as evidence in making the factual determinations required by the Sentencing Guidelines." *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999). Although Rule 32 of the Federal Rules of Criminal Procedure requires the court to

resolve disputed issues of fact before sentencing, the court can adopt facts contained in the PSR without inquiry as long as the "facts had an adequate evidentiary basis and the defendant does not present rebuttal evidence." *United States v. Puig-Infante*, 19 F.3d 929, 943 (5th Cir. 1994). Rebuttal evidence must consist of more than a defendant's objection; it requires a demonstration that the information is "materially untrue, inaccurate or unreliable." *Huerta*, 182 F.3d at 364 (citations omitted). Although "Tampico objected to a number of factual issues in the PSR, he did not introduce any rebuttal evidence. Thus, the district court did not err in accepting the PSR as evidence.[4]

III

For the reasons stated above, Tampico's conviction and sentence are

AFFIRMED.

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[4] Tampico urges us to reconsider our determination that the district court can adopt facts in the PSR as evidence in the light of the Eighth circuit's holding that the PSR cannot be considered as evidence over the objection of the defendant. One panel of this court, however, cannot overrule the decision of another panel. *United States v. Fowler*, 216 F.3d 459, 460 (5th Cir. 2000).

APPENDIX B

3. 18 U.S.C. §2252 provides as follows:

(a) Any person who –

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if –

(A) the producing of such visual depiction involves the the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either –

***

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which

have been mailed or so shipped or transported, by any means, including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either –

***

(B) knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a

minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 5 years, or both, but if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) Affirmative Defense. – It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant –

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof –

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

4. 18 U.S.C. § 2252A provides as follows:

(a) Any person who –

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes –

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

(4) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated

sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that –

(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

(2) each such person was an adult at the time the material was produced; and

(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

(d) Affirmative Defense. – It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant –

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof –

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

5. 18 U.S.C. § 2256 provides as follows:

For the purposes of this chapter, the term –

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated – (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and

(9) "identifiable minor" –

(A) means a person –

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

No. 01-571

In the Supreme Court of the United States

JONATHAN M. TAMPICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the prohibition of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct" in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) (Supp. V. 1999), violates the First Amendment.

2. Whether *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), should be overruled.

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In the Supreme Court of the United States

No. 01-571

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-17) is unpublished, but the judgment is noted at 265 F.3d 1059 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2001. The petition for a writ of certiorari was filed on October 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts sworn to by petitioner, Trial Tr. 36-37, and on the unchallenged testimony of an FBI agent, *id.* at 45, petitioner was convicted in the United States District Court for the

Southern District of Texas of one count of possessing material involving the sexual exploitation of minors—namely, three or more books, magazines, periodicals, films, video tapes or other matter which contain any visual depiction that has been mailed, shipped, or transported in interstate commerce, if the producing of the visual depiction involves the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct, in violation of 18 U.S.C. 2252(a)(4)(B) (Supp. V 1999) (count 1);[1] one count of receiving materials containing child pornography that have been mailed, shipped, or transported in interstate commerce, in violation of 18 U.S.C. 2252A(a)(2) (Supp. V 1999) (count 2); and one count of distributing materials containing child pornography that have been mailed, shipped, or transported in interstate commerce, in violation of 18 U.S.C. 2252A(a)(2) (Supp. V 1999) (count 3).[2] He was sentenced to concurrent prison terms of 60 months on count 1 and 360 months on counts 2 and 3, to be followed by five years of supervised release. He was also ordered to pay a $5000 fine. Pet. 3. The court of appeals affirmed. Pet. App. 1-17.

1. In 1989, about ten years before the conviction at issue here, petitioner was convicted by the State of California of sexually molesting a boy under the age of 14 years, and was sentenced to six years in prison. In October 1992, he was released on the condition that he

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[1] 18 U.S.C. 2252(a)(4)(B) (Supp. V 1999) has since been amended to prohibit the possession of *one* (as opposed to *three*) or more such materials. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 203(a)(1), 112 Stat. 2974.

[2] Petitioner was acquitted of reproducing child pornography for distribution, in violation of 18 U.S.C. 2252A(a)(3) (Supp. V 1999) (count 4). Pet. 3.

not possess child pornography. On September 12, 1995, his parole was revoked after police found a large volume of child pornography at his residence. On February 23, 1996, he was released again, when California police discovered that he had discharged his parole. He moved to Texas without informing either the California or Texas authorities of his new address. A television broadcast of the show "America's Most Wanted" on July 11, 1998, led to his arrest in Texas. Pet. App. 2; Gov't C.A. Br. 4-6.

After arresting petitioner, authorities seized from his residence and storage shed a large quantity of child pornography that he had brought with him from California by U-Haul. Two people—Jerome Ciolino, with whom petitioner was living, and Donald Sandberg, who had obtained child pornography from petitioner—gave statements implicating petitioner in offenses relating to child pornography. Pet. App. 2; Trial Tr. 14, 16-25, 39-44, 49; Gov't C.A. Br. 6-8.

Most of the child pornography was "hard core" (PSR Add. 9-10 para. 27; see also descriptions of specific images at PSR 3-4 para. 7, accepted by district court at Sent. Tr. 7). There were depictions of "hundreds of individual children" (PSR Add. 16 para. 52), at least one of whom could be identified (PSR 8 para. 33, 9 para. 39; Sent. Tr. 26-27, 35). The sheer number of children involved made it "complete[ly] impossib[le]" to identify them all. Sent. Tr. 35; see also *id.* at 36. The depictions were on videotapes (including videotapes of actual minors, see PSR 6-7 paras. 24-25, PSR Add. 10 para. 29); photographs (including photographs of actual minors, see Trial Tr. 17, 25, 27, 29, 42 and Sent. Tr. 27-28, 30, 35; see also PSR 4 para. 7 (referring to "[h]undreds of Polaroids" of children), 4 para. 9 (identifying two children depicted), 12 paras. 60-61, PSR Add. 8-9

para. 23(B) ("original photographs"), 6 paras. 14(A) and 14(B) (photographs of children in bondage), 10 para. 29); slides (Sent. Tr. 27; PSR 6 paras. 22-23; PSR Add. 10 para. 29); 8 and 16 millimeter films (PSR 4 para. 7); and petitioner's computer hard drive and disks (including an image of an identified child exposing his genitals, see Sent. Tr. 31, PSR 6 para. 23, PSR Add. 6 para. 16, and an image of a boy in bondage who also appeared in original Polaroid photographs, see Sent. Tr. 30-31, PSR 8 para. 32).

2. Petitioner was indicted in four counts for, respectively, possessing material containing visual depictions the production of which involved the use of a minor engaged in sexually explicit conduct, receiving materials containing child pornography, distributing materials containing child pornography, and reproducing child pornography for distribution. A fifth count concerned forfeiture of his property under 18 U.S.C. 2253. The Child Pornography Prevention Act of 1996 (CPPA) defines child pornography to include any visual depiction, the production of which "involves the use of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(A) (Supp. V 1999), as well as any visual depiction, including any "computer or computer-generated image or picture," that is "or appears to be" of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(B) (Supp. V 1999).[3]

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[3] The CPPA also defines child pornography to include any visual depiction "advertised, promoted, presented, described, or distributed" in a manner "that conveys the impression that the material * * * contains a visual depiction of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(D) (Supp. V 1999), and any visual depiction "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(C) (Supp. V 1999).

Petitioner moved to dismiss the indictment on the ground that, insofar as 18 U.S.C. 2256(8)(B) (Supp. V 1999) prohibited visual depictions that "appear[] to be" of a minor engaging in sexually explicit conduct, the statute was vague and overbroad and therefore violative of the First Amendment. Mot. to Dismiss Indictment of Jan. 27, 1999. The district court denied the motion. Order of Jan. 29, 1999.

The district court found petitioner guilty on counts 1-3 (possessing material containing visual depictions the production of which involved the use of a minor engaged in sexually explicit conduct, receiving materials containing child pornography, and distributing materials containing child pornography) and not guilty on count 4 (reproducing child pornography for distribution). Trial Tr. 50.

3. Petitioner's Guidelines sentencing range was 210-262 months' imprisonment, based on a total offense level of 35[4] and a criminal history category of III. Sent. Tr. 60. The court upwardly departed three offense levels, Pet. App. 16, for a Guidelines range of 292-365 months. The court imposed concurrent prison terms of 360 months on petitioner's 18 U.S.C. 2252A(a)(2) (Supp. V 1999) convictions for receipt and distribution under counts 2 and 3. This was the maximum sentence authorized for a recidivist such as petitioner, who had previously been convicted of committing lewd or lascivious acts with a child under 14 years of age, in violation of California law (see PSR 12-13 paras. 59-64,

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[4] Petitioner's total offense level reflected enhancements for distribution of the child pornography he received, for material that portrayed sadistic or masochistic conduct, and for previous exploitation of a minor. Sent. Tr. 77.

17 para. 90).[5] The court imposed a concurrent prison term of 60 months on count 1. Sent. Tr. 76.[6]

The court based the upward departure on several factors. First, the "she[e]r volume" of child pornography involved in this case "was not * * * adequately taken into consideration by the Guidelines." Sent. Tr. 78; see also Judgment 6.02. Second, petitioner "sexually molested numerous children aside from the identified victim in this case." Judgment 6.02; see also Sent. Tr. 78. Third, petitioner "t[ook] advantage" of the Big Brothers Program, the purpose of which is to help children in need of male supervision, for "his own sexual depravity"; by becoming a Big Brother, petitioner "completely thwart[ed] the entire purpose of the program, besmirch[ing] [its] image [and the image of] other [such] programs." Sent. Tr. 78-79; see also Judgment 6.02. Fourth, petitioner was involved in NAMBLA (the North American Man Boy Love Association), an organization that promotes sexual relations between children and adults by supporting a foster home in Thailand that sexually exploits children. Judgment

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[5] 18 U.S.C. 2252A(b)(1) (Supp. V 1999) provides, in pertinent part:

> Whoever violates, or attempts or conspires to violate, paragraph[ ] * * * (2) * * * of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction * * * under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

[6] The court also ordered the forfeiture of items that the parties agreed were subject to forfeiture. Trial Tr. 45-47, 50.

6.02; see also Sent. Tr. 77-79 (petitioner and known pedophiles supported foster homes in Thailand in order to have unlimited access to young boys, as evidenced by a number of Polaroid pictures, provided by Thai officials, depicting petitioner with young Thai boys sitting on his lap). Fifth, petitioner's criminal history category significantly underrepresented the seriousness of his criminal history and the likelihood that he would commit future crimes. Sent. Tr. 78-79; Judgment 6.02. The court also found that petitioner had failed to notify authorities of his change of residence, which he was required to do as a convicted sex offender. Sent. Tr. 78; Judgment 6.02.

The court concluded that a total sentence of 360 months "meets the sentencing objectives of punishment, deterrence and incapacitation, provides an opportunity for [petitioner] to be at least counseled towards rehabilitation during his term of imprisonment, and protects society from [him]." Sent. Tr. 80.

4. On appeal, petitioner made two principal claims. First, he brought facial and as-applied challenges to the "appears to be" language in 18 U.S.C. 2256(8) (Supp. V 1999). Second, he argued for the first time that his prior, plea-based California conviction for committing lewd or lascivious acts with a child under 14 years of age should not have been used to enhance his sentences on counts 2 and 3 because it had not been alleged in his indictment. Petitioner acknowledged, however, that for him to prevail on the latter claim, this Court would have to overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

5. The court of appeals affirmed. Pet. App. 1-17. With respect to petitioner's claim that the definition of child pornography under 18 U.S.C. 2256(8) (Supp. V 1999) is vague and overbroad, in violation of the First

Amendment, to the extent that it includes any visual depiction that "appears to be" of a minor engaging in sexually explicit conduct, the court ruled the claim "foreclosed by our recent decision in *United States* v. *Fox*, 248 F.3d 394 (5th Cir. 2001), which upheld the constitutionality of the 'appears to be' language." Pet. App. 6. As for petitioner's claim that the district court erred in enhancing his sentence under 18 U.S.C. 2252A(b)(1) (Supp. V 1999) for a prior conviction relating to sexual abuse, because the prior conviction was not alleged in the indictment, the court pointed out that petitioner "recognize[d] * * * that this issue is foreclosed" by *Almendarez-Torres* v. *United States*, 523 U.S. at 247. Pet. App. 4-5 n.1.[7]

DISCUSSION

1. Petitioner urges (Pet. 6-18) this Court to resolve the circuit conflict over the constitutionality of CPPA's "appears to be" provisions, 18 U.S.C. 2252A (Supp. V 1999), 2256(8)(B) (Supp. V 1999), which apply to petitioner's convictions under counts 2 and 3 of the indictment.[8] While this case was on appeal, the Court

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[7] The court of appeals also rejected petitioner's claims (a) that the evidence of distribution was insufficient (the court reviewed this claim for plain error, because petitioner had failed to make and renew a motion for judgment of acquittal), Pet. App. 6-8; (b) that the district court abused its discretion in departing upward on petitioner's sentences for receipt and distribution of child pornography, Pet. App. 8-16; and (c) that the district court erred in accepting portions of the presentence report to which petitioner had objected without offering any rebuttal evidence, Pet. App. 16-17. Petitioner does not renew those claims in this Court.

[8] The "appears to be" provision does not apply to petitioner's conviction under count 1 for possessing material involving the sexual exploitation of minors, in violation of 18 U.S.C. 2252(a)(4)(B) (Supp. V 1999), because that offense by definition involved "the use

granted the government's petition for a writ of certiorari in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001). That case presents the same conflict for resolution. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.

2. Also with respect to counts 2 and 3, petitioner contends (Pet. 19-24) that this Court should overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which rejected statutory and constitutional arguments that the fact of a defendant's conviction of an aggravated felony must be alleged in the indictment in order for the sentencing court to impose an enhanced sentence under 8 U.S.C. 1326(b)(2) (Supp. V 1999). In the district court, however, petitioner argued only that he lacked notice that his prior conviction would be used to enhance his sentence. Sent. Tr. 57. At the same time, he (1) failed to respond to the government's counterargument (which the district court accepted) that he had received such notice at his initial appearance and arraignment, and (2) could not point to any authority entitling him to such notice in any event. Sent. Tr. 56-58; see also PSR Add. 15 para. 46. Accordingly, petitioner can succeed on his indictment claim only if he demonstrates that the district court's imposition of an enhanced sentence in accordance with *Almendarez-Torres* was plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). Petitioner cannot make that showing.

As the court of appeals correctly ruled, Pet. App. 4-5 n.1, under controlling precedent, there is no error in petitioner's sentence. Indeed, petitioner acknowledged

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of a minor engaging in sexually explicit conduct," and the evidence established petitioner's use of actual minors.

as much on appeal. *Ibid.* ("Tampico recognizes, however, that this issue is foreclosed by [*Almendarez-Torres*]."). No decision of this Court holds that, in order for a defendant's sentence to be enhanced above an otherwise governing statutory maximum based on a prior conviction, the fact of the prior conviction must be charged in the indictment. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), on which petitioner relies, did not overrule *Almendarez-Torres*. *Id.* at 487-490. Moreover, while this Court has held that an error is sufficiently obvious for correction under Rule 52(b) if the error is "plain" by the time of appellate consideration, *Johnson* v. *United States*, 520 U.S. 461, 468 (1997), this Court has never held that an error may be considered "plain" if the Court would have to overrule one of its decisions to establish the error.

This Court has denied other certiorari petitions that presented the claim that *Almendarez-Torres* should be overruled in light of *Apprendi*, where the petitioner did not raise the issue in the district court. See, *e.g.*, *Cho* v. *United States*, No. 00-10301 (Oct. 1, 2001); *Santos* v. *United States*, No. 00-10181 (Oct. 1, 2001); *Rangel-Mendoza* v. *United States*, 121 S. Ct. 2525 (2001); *Galvan-Zapata* v. *United States*, 121 S. Ct. 1739 (2001); *Walker* v. *United States*, 121 S. Ct. 1408 (2001); *Dabeit* v. *United States*, 121 S. Ct. 1214 (2001). There is no basis for a different result in this case.

In any event, in holding in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," 530 U.S. at 490, the Court expressly declined to disturb the holding of *Almendarez-Torres* that prior convictions may be treated as a sentencing factor. See *id.* at 487-490. The

exception from *Apprendi* for recidivism is sound. Principles of notice and fundamental fairness do not require that an indictment charge, or that a jury find, that a defendant had one or more prior convictions in order to be sentenced to a longer term as a recidivist. A defendant cannot genuinely claim surprise concerning the fact of a prior conviction, because he previously underwent the criminal process that resulted in the conviction. Petitioner claims no genuine surprise here.[9] Nor will a prior conviction ordinarily present any significant factual dispute for a fact-finder to resolve. Petitioner did not claim at sentencing, and does not suggest now, that there is any such dispute concerning his prior, plea-based conviction. The Court observed in *Apprendi* itself that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge [rather than a jury] to find the required fact [that enhances a sentence] under a lesser standard of proof." 530 U.S. at 496. As the Court pointed out in *Jones* v. *United States*, 526 U.S. 227, 249 (1999), "[o]ne basis for th[e] possible constitutional distinctiveness" of the treatment of prior convictions is the presence of the procedural safeguards of "fair notice, reasonable doubt, and jury trial guarantees" in establishing the fact of prior conviction.

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[9] In passing, petitioner asserts that the government did not give him "formal" notice before trial of its intention to seek a sentencing enhancement based on his previous conviction, but he does not deny that the government notified him before arraignment of its intention to do this. Pet. 19. Moreover, as petitioner concedes, the presentence report constituted notice. Pet. 19-20.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the decision of the Court in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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DECEMBER 2001